Supreme Court, U.S.
FILED
JAN 5 1998
CLERK

No. 97-241

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ZOLLO DRUM COMPANY, INC. and
NRS CARTING COMPANY, INC.,
Petitioners,

v.

B.F. GOODRICH CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

NICHOLAS J. HARDING
KOSLOFF & HARDING
28 North Main Street
West Hartford, CT 06107

WILLIAM G. BECK
Counsel of Record
ALOK AHUJA
LATHROP & GAGE L.C.
2345 Grand Boulevard
Kansas City, MO 64108
(816) 292-2000

Counsel for the Petitioners

January 2, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether federal common law overrides state corporation law limitations on the imposition of successor liability on asset purchasers in cases under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq.*

RULE 29.6 STATEMENT

Petitioners Zollo Drum Company, Inc. and NRS Carting Company, Inc. have no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
I. THE COURT'S DECEMBER 12, 1997 GRANT OF CERTIORARI IN *UNITED STATES v. CPC INTERNATIONAL* PROVIDES ADDITIONAL REASONS FOR GRANTING CERTIORARI IN THIS CASE ALSO	3
A. The Court's decision to review *CPC* may well require the Court to determine whether it is appropriate to create federal common law under CERCLA to displace traditional rules of state corporation law	3
B. Answering only the narrow question presented by the certiorari petitions in *CPC* would not resolve the existing circuit conflict concerning whether it is proper to create federal common law in CERCLA cases, but deciding this case also would do so	5
C. The grant of certiorari in *CPC* shows there is no rule against reviewing interlocutory decisions which reverse dispositive rulings and remand	7
II. THE NINTH CIRCUIT'S DECEMBER 30, 1997 DECISION IN *SANTA FE RAILWAY v. BROWN & BRYANT* REFUSES TO FOLLOW THE DECISION BELOW, AND DEEPENS THE CONFLICT IN THE POST-*O'MELVENY* DECISIONS CONCERNING WHETHER THERE IS ANY JUSTIFICATION FOR CREATING FEDERAL COMMON LAW UNDER CERCLA	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991)	4
Atchison, T. & S.F. Ry. Co. v. Brown & Bryant, Inc., No. 96-15529, 1997 WL 792675 (9th Cir. Dec. 30, 1997)	1, 2, 8, 9
Atherton v. FDIC, 117 S. Ct. 666 (1997)	7, 8
Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991)	4, 6
Lansford-Coaldale Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993)	6
Louisiana-Pac. Corp. v. Asarco, 909 F.2d 1260 (9th Cir. 1990)	8
O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994)	2, 7, 8, 9
Schiavone v. Pearce, 79 F.3d 248 (2d Cir. 1996)	4, 5, 6
United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997) (*en banc*), *cert. granted*, Nos. 97-296 & 97-454 (U.S. Dec. 12, 1997)	4, 6
United States v. CPC Int'l, Inc., No. 1:96-680 (W.D Mich. Aug. 11, 1997)	6
United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988)	4
United States v. TIC Inv. Co., 68 F.3d 1082 (8th Cir. 1995), *cert. denied*, 117 S. Ct. 50 (1996)	7
Statutes	
CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A)	3
CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2)	3
Miscellaneous	
Evelyn F. Heidelberg, *Parent Corporation Liability Under CERCLA: Toward a Uniform Federal Rule of Decision*, 22 Pac. L.J. 854 (1991)	4
Kathryn R. Heidt, *Liability of Shareholders Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*, 52 Ohio St. L.J. 133 (1991)	4
Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 Harv. L. Rev. 986 (1986)	4-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-241

ZOLLO DRUM COMPANY, INC. and
NRS CARTING COMPANY, INC.,
Petitioners,

v.

B.F. GOODRICH CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

Two events which occurred after Petitioners filed their Reply Brief provide additional justification for a grant of certiorari in this case. On December 12, 1997, the Court granted certiorari in *United States v. CPC Int'l, Inc.*, No. 97-454, and *Michigan Dep't of Envtl. Quality v. CPC Int'l, Inc.*, No. 97-296. And on December 30, 1997, the Ninth Circuit decided *Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, No. 96-15529, 1997 WL 792675, which holds that state law, not federal common law, governs successor liability issues under CERCLA.

The grant of certiorari in *CPC* provides additional support for a grant of review in this case, for three reasons. First, in deciding *CPC* the Court may well be required

to determine the Question Presented in this case—whether federal common law should be created in CERCLA cases to override state corporation law. Such an important decision should be based on full briefing and argument of this fundamental issue, as will occur if certiorari is granted in this case also.

Second, answering only the narrow question presented by the certiorari petitions in *CPC*, which concerns the circumstances under which a parent corporation can be held liable as an "operator" under CERCLA based on involvement in its subsidiary's affairs, will not resolve the existing circuit conflict, even in the parent-subsidiary cases. As explained in the Petition, the question whether it is appropriate to create federal common law under CERCLA to override state law arises in a number of related contexts, but most frequently in claims of successor liability. Deciding *CPC* based on the narrow statutory argument advanced by the United States would do nothing to resolve the larger issue whether there is any justification in CERCLA for creating a federal common law of business organizations. Granting certiorari in this case will assure that this issue, which has badly divided the courts of appeals, is decided without further delay.

Third, although the United States' Brief in Opposition in this case argues that certiorari is unwarranted because the lower court remanded for further proceedings, in *CPC* the United States argued the converse—that certiorari was appropriate *despite* the "interlocutory" nature of the lower court's decision. The Court's grant of certiorari in *CPC* shows that the interlocutory nature of the lower court's decision in this case does not justify denial of certiorari.

The Ninth Circuit's December 30 decision in *Brown & Bryant* deepens the circuit conflict concerning whether to create federal common law rules of successor liability under CERCLA. Unlike the decision below, which claimed that *O'Melveny & Myers v. FDIC*, 512 U.S. 79

(1994), *supports* the creation of federal common law under CERCLA, the Ninth Circuit found that *O'Melveny* has undercut each of the rationales the courts have offered to justify creating federal common law under CERCLA. As a result, the Ninth Circuit held that its own earlier decision adopting federal common law (on which the Second Circuit relied in this case) is no longer good law. The Ninth Circuit's reading of *O'Melveny* is directly contrary to the decision of the court below, and provides further evidence that the conflict among the circuits will persist until this Court intervenes.

I. THE COURT'S DECEMBER 12, 1997 GRANT OF CERTIORARI IN *UNITED STATES v. CPC INTERNATIONAL* PROVIDES ADDITIONAL REASONS FOR GRANTING CERTIORARI IN THIS CASE ALSO.

The Court's grant of certiorari in *CPC* provides additional support for granting certiorari in this case, for three reasons.

A. The Court's decision to review *CPC* may well require the Court to determine whether it is appropriate to create federal common law under CERCLA to displace traditional rules of state corporation law.

CPC concerns the circumstances in which a parent corporation may be held liable as an "operator" under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), based on its involvement in the affairs of a separate subsidiary corporation. In its Petition, the United States argues that "the plain language" of the statute, which defines an "operator" as "any person * * * operating such facility," CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A), provides a "liability standard" which the court below should have applied: "where the evidence shows that a parent corporation, through the use of *its own agents*, actively participated in the subsidiary's operation of a facility, the parent corporation is directly liable under federal law." Petition for a Writ of Certiorari at 16, 19,

20, *United States v. CPC Int'l, Inc.*, No. 97-454 (filed Sept. 10, 1997) (emphasis original).

The United States' Petition in *CPC* struggles to define the issue of parent corporation liability as a straightforward question of statutory interpretation. Nevertheless, the lower court recognized that the liability standard the United States advocates would require the court to disregard "time-honored limited liability protections afforded by the corporate form," and to rely instead on "vague, expansive concepts" of parent corporation liability having no basis in CERCLA's text or legislative history. *United States v. Cordova Chem. Co.*, 113 F.3d 572, 579 (6th Cir. 1997) (*en banc*). The Sixth Circuit refused to adopt the federal common law standard of parent corporation liability advocated by the United States; the court ruled that "[w]hether the circumstances in this case warrant a piercing of the corporate veil will be determined by state law." *Id.* at 580. As a basis for its holding, the Sixth Circuit cited and followed its earlier decision in *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991), in which it had applied state law, and refused to create federal common law, to resolve successor liability issues under CERCLA. *See Cordova Chem.*, 113 F.3d at 580.[1]

---

[1] Other courts have similarly recognized that the parent corporation liability standard the United States prefers is *not* based on the specific text or legislative history of the statute, but instead requires creation of rules of decision based on nothing more than the statute's general policy objectives (*i.e.*, federal common law). *See, e.g., Schiavone v. Pearce*, 79 F.3d 248, 253-54 (2d Cir. 1996); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991); *United States v. Mottolo*, 695 F. Supp. 615, 624 (D.N.H. 1988); *see also* Kathryn R. Heidt, *Liability of Shareholders Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*, 52 Ohio St. L.J. 133, 183-86 (1991); Evelyn F. Heidelberg, *Parent Corporation Liability Under CERCLA: Toward a Uniform Federal Rule of Decision*, 22 Pac. L.J. 854 (1991); Note, *Liability of Parent*

Likewise, in this case the court of appeals recognized the close relationship between the successor liability and parent corporation liability issues, noting that its adoption of a federal common law standard of successor liability was consistent with its earlier decision holding a parent corporation directly liable for the actions of a subsidiary. *See* Pet. App. at 22a (citing *Schiavone v. Pearce*, 79 F.3d 248 (2d Cir. 1996)).

Despite the narrow manner in which the United States has attempted to frame the issue in *CPC*, it is likely the Court will find it necessary to address the issue decided by the courts below, both in this case and in *CPC*: whether it is appropriate to create federal common law standards of liability under CERCLA, preempting established state corporation law.

B. Answering only the narrow question presented by the certiorari petitions in *CPC* would not resolve the existing circuit conflict concerning whether it is proper to create federal common law in CERCLA cases, but deciding this case also would do so.

As the Petition explains, the question whether it is appropriate to create federal common law under CERCLA to override state laws governing business organizations arises in a number of closely-related contexts. The courts of appeals have considered whether it is appropriate to create federal common law to impose CERCLA liability on asset purchasers, parent corporations, dissolved corporations and their shareholders, and limited partners, and have reached conflicting conclusions. Pet. at 10-11. The federal common law issue has arisen most frequently in connection with the successor liability of asset pur-

---

Corporations for Hazardous Waste Cleanup and Damages, 99 Harv. L. Rev. 986, 1003 (1986) (recognizing that "Congress did not specifically state whether parent corporations of responsible parties should be brought within the purview of CERCLA," and arguing that the courts should therefore develop federal common law rules to govern the CERCLA liabilities of parent corporations).

chasers. Reply Br. at 8-9 n.10; Reply App. at 1a-6a. This issue has badly divided the courts of appeals, and demands immediate resolution.

If the Court decides *CPC* based solely on a construction of CERCLA's "operator" definition, however, that decision will do nothing to resolve the larger issue whether there is any justification in CERCLA for creating a federal common law of business organizations. Indeed, the decision would not even resolve all of the issues concerning *parent corporation liability* under CERCLA, since a decision rejecting the United States' statutory construction argument would not necessarily resolve the issue whether state law, or federal common law, should supply the standard for parent corporation "operator" liability. Compare *Schiavone v. Pearce*, 79 F.3d 248, 253-54 (2d Cir. 1996) (federal common law), with *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990) (state law), *cert. denied*, 498 U.S. 1108 (1991). Moreover, a decision in *CPC* would not resolve the circuit conflict concerning the liability of parent corporations as facility "owners", or as "arrangers" for disposal.[2]

---

[2] There is a conflict among the circuits concerning whether federal common law or state law controls a parent corporation's liability as the "owner" of contaminated property whose title is held by a subsidiary. Compare *Lansford-Coaldale Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993) ("given the federal interest in uniformity in the application of CERCLA, it is federal common law, not state law, which governs when corporate veil-piercing [to impose 'owner' liability on a parent corporation] is justified under CERCLA"), with *Cordova Chem.*, 113 F.3d at 582 (parent corporation can only be held liable as an "owner" based on piercing the corporate veil under state law). The *CPC* Petitions do not challenge the Sixth Circuit's holding that state law governs the circumstances in which a parent corporation can be held liable as an "owner" of its subsidiary's property. Moreover, in a later decision in *CPC*, the district court has held that state law also governs the circumstances in which a parent corporation can be held liable as an "arranger" based on its involvement in its subsidiary's affairs. *United States v. CPC Int'l, Inc.*, No. 1:96-680 (W.D. Mich. Aug. 11, 1997). Conversely, the Eighth Circuit has

Deciding *CPC* alone will not finally resolve the federal common law issue, and will result in a host of subsequent petitions addressing facets of this single issue on a piecemeal basis. Granting certiorari in this case will assure that the propriety of creating federal common law under CERCLA is determined, and the interrelated circuit conflicts resolved, finally and without further delay.

C. The grant of certiorari in *CPC* shows there is no rule against reviewing interlocutory decisions which reverse dispositive rulings and remand.

The United States' Brief in Opposition in this case argues that the Petition should be denied because the court of appeals reversed a grant of summary judgment, and remanded for further proceedings. *E.g.*, Br. in Opp. at 13-14, 16. Petitioners addressed this argument in their Reply Brief.[3] In its Reply Brief in *CPC*, the United States took a position directly contrary to its Brief in Opposition in this case, and argued that certiorari should be granted even though the court of appeals had remanded for further factual development:

> [T]here is [] no merit to CPC's suggestion that review is unwarranted because this case is in an interlocutory posture. While the Sixth Circuit directed the district court on remand to make further factual findings and reconsider issues pertaining to the liability of Aerojet's subsidiaries, those issues turn on

---

decided this issue as a matter of federal rather than state law. *United States v. TIC Inv. Co.*, 68 F.3d 1082, 1091-92 (8th Cir. 1995), *cert. denied*, 117 S. Ct. 50 (1996). Once again, resolution of the narrow issue of "operator" liability presented by the *CPC* Petitions would not resolve this conflict.

[3] Petitioners argued in their Reply Brief that this Court has frequently granted certiorari in cases which reversed and remanded grants of summary judgment, so long as the Question Presented was properly before the Court. Most notably, the Court granted certiorari in both *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and *Atherton v. FDIC*, 117 S. Ct. 666 (1997), despite the interlocutory nature of the lower court decisions. Reply Br. at 3.

> a factual inquiry that is irrelevant to resolving the question presented by the petition (as the court of appeals' resolution of that question while ordering the remand plainly suggests).

Reply Brief for the United States at 7 n.2, *United States v. CPC Int'l, Inc.*, No. 97-454 (filed Dec. 7, 1997).

The merit of this argument, and the corresponding lack of merit in the United States' opposition in this case, are established by the Court's grant of certiorari in *CPC*. In this case, as in *CPC*, the court of appeals decided the exact question presented by the Petition, and remanded for further factual development necessary only under the liability standard the court of appeals adopted. That the decision is "interlocutory" does not bar review.

II. THE NINTH CIRCUIT'S DECEMBER 30, 1997 DECISION IN *SANTA FE RAILWAY v. BROWN & BRYANT* REFUSES TO FOLLOW THE DECISION BELOW, AND DEEPENS THE CONFLICT IN THE POST-*O'MELVENY* DECISIONS CONCERNING WHETHER THERE IS ANY JUSTIFICATION FOR CREATING FEDERAL COMMON LAW UNDER CERCLA.

In the decision below, the Second Circuit relied on *Louisiana-Pacific Corp. v. Asarco*, 909 F.2d 1260 (9th Cir. 1990), as support for its decision to create a federal common law of successor liability in CERCLA cases. Pet. App. at 21a. On December 30, the Ninth Circuit decided *Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, No. 96-15529, 1997 WL 792675, and held that *Louisiana-Pacific* has been superseded by *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and *Atherton v. FDIC*, 117 S. Ct. 666 (1997). Contrary to the decision below, the Ninth Circuit accordingly held that state law, not federal common law, governs successor liability issues in CERCLA cases.

The Ninth Circuit's reading of *O'Melveny* directly conflicts with the interpretation of that case by the court

below. Unlike the decision below, which claimed that *O'Melveny* supports adoption of federal common law under CERCLA, Pet. App. at 86a, the Ninth Circuit recognized that *O'Melveny* "rejected many of the very arguments that *Louisiana-Pacific* accepted in deciding CERCLA necessitated a set of uniform federal rules of successor liability." 1997 WL 792675, at *3. Moreover, while it noted that the decision below invoked the "need for national uniformity" to justify creating federal common law, *id.* at *4 n.3, *Brown & Bryant* held that "there has been no real explanation of the need for uniformity in the particular area of successor liability" sufficient to satisfy *O'Melveny*'s demanding standards. *Id.* *4.[4]

Brown & Bryant deepens the conflict among the post-*O'Melveny* court of appeals decisions concerning whether there is any justification for creating a federal common law of successor liability under CERCLA. The Ninth Circuit's reading of *O'Melveny* directly conflicts with the Second Circuit's interpretation of that seminal decision, and shows that the conflict in the circuits over the meaning and relevance of *O'Melveny* will persist until this Court provides further clarification of the circumstances in which adoption of federal common law is proper.

---

[4] The Ninth Circuit also held that, even if it were to adopt federal common law rules of successor liability, the federal common law rule would be the traditional "mere continuation" exception prevailing in most States, *not* the expansive "substantial continuity" exception adopted by the Second Circuit in this case. 1997 WL 792675, at *6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NICHOLAS J. HARDING
KOSLOFF & HARDING
28 North Main Street
West Hartford, CT 06107

WILLIAM G. BECK
Counsel of Record
ALOK AHUJA
LATHROP & GAGE L.C.
2345 Grand Boulevard
Kansas City, MO 64108
(816) 292-2000

Counsel for the Petitioners

January 2, 1998